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Tan Sri Halim Saad v Tan Sri Nor Mohamed Yakcop & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-339–04 OF 2013
HANIPAH FARIKULLAH J
3 JANUARY 2014

Civil Procedure — Limitation — Allegation of fraud — Accrual of limitation period — Whether there was false representation — Whether s 29 of the Limitation Act 1953 applicable — Whether limitation period postponed

Civil Procedure — Limitation — Computation of time — Action for breach of contract — Time to start running when plaintiff first comes to know that defendant will not comply with terms of agreement

Civil Procedure — Striking out — Application for — Plaintiff's allegations inconsistent with contemporaneous documents and inherently improbable — Whether statement of claim scandalous, frivolous, vexatious and abuse of the process of court — Whether claim clearly unsustainable

Contract — Formation — Concluded contract — Agreement allegedly concluded at meeting — Representative attending meeting not having authority to conclude agreement — Alleged oral agreement inherently incredible and/or inconsistent with contemporaneous documents — Letter purporting to set out terms of agreement not contradicted or rebutted — Whether letter evidence of concluded contract — Whether legally binding agreement arose

The plaintiff claimed that the second and third defendants through their agent, the first defendant, had induced the plaintiff to exit both the Renong and UEM Group in consideration of the payments stated in a purported 2001 Agreement. According to the plaintiff, by a letter dated 18 July 2001 to Tun Dr Mahathir, the plaintiff recorded his understanding of what had transpired at a meeting on 17 July 2001 with the first defendant, including 'compensation' of, inter alia, RM1.3 billion to be paid to him by the third defendant. The plaintiff contended that the first defendant had been given authority by Tun Dr Mahathir to make decision on behalf of the government and the third defendant. The letter was thus said to record the alleged 2001 Agreement. The plaintiff contended that since neither Tun Dr Mahathir, the first defendant nor anyone else had responded to the 18 July 2001 letter, therefore it stood unrebutted. The plaintiff alleged that representations made by the first defendant were fraudulent as the defendants never had any intention of

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performing the 2001 Agreement. According to the plaintiff, soon after receiving a sum of RM165m from the third defendant, he met the first defendant who assured him that the second and third defendant would deal with payments due under the 2001 Agreement later. This, the plaintiff claimed, formed the basis of a purported 2003 Agreement. The plaintiff contended that his consent to enter into the purported 2001 and 2003 Agreements was caused by the fraud of the defendants and that he was entitled to insist that the 2001 and/or 2003 Agreements be performed and that he be put in a position that he would have been if the representations had been true. The defendants applied to strike out the plaintiff's claim under O 18 r 19 of the Rules of Court 2012 on the grounds that the relief sought was scandalous, frivolous and vexatious, calculated to prejudice, embarrass and delay the fair trial of the action, and an abuse of the process of the court. The defendants also alleged that the plaintiff's claim should be struck out as it was time barred. The third defendant further argued that by requesting and accepting the sum of RM165m, the plaintiff had abandoned all his rights under the alleged 2001 Agreement and the third defendant was thereby released from all purported obligations thereunder. The plaintiff argued that since the issue of whether the first defendant had authority was subject to serious factual disputes, it could not be resolved by affidavit evidence and had to go for trial.

Held, allowing the defendants' applications with costs:

(1) Since there was no response or confirmation from Tun Dr Mahathir, no legal binding contract had been created in respect of the terms of the 18 July 2001 letter. The evidence clearly did not establish that any agreement had been reached. There was never any admission by the defendants of the 18 July 2001 letter (see paras 29–30).

(2) There was no factual dispute in respect of the plaintiff's contention that the first defendant had authority to decide on behalf of the government and the third defendant. It was plain from the evidence that the plaintiff's letter to Tun Dr Mahathir dated 31 October 2002 showed that the decision on the issue of compensation rested with Tun Dr Mahathir and not with the first defendant. In this respect, the first defendant was authorised only to deal with the matter but the decision on the issue of compensation was with Tun Dr Mahathir. Further, the plaintiff's own letter dated 16 July 2001 to Tun Dr Mahathir showed that the final decision on the issue of compensation was with Tun Dr Mahathir (see paras 34–37).

(3) Even if the court was wrong in concluding that there was no 2001 Agreement between the parties, the evidence clearly showed that the plaintiff first came to know that the terms of the 2001 Agreement were not going to be met by the defendants, vide a letter dated 11 November 2002. Hence, time started running from this date and the matter became

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statute barred as at 12 November 2008. The action in this case was filed on 17 April 2013 which was four years and five months out of time (see paras 42 & 48).

(4) The plaintiff's pleading was premised on the false representation made by the first defendant to induce him to exit from Renong and UEM Group. However, the evidence showed that there was no pre-agreement statements amounting to an inducement that emanated from the first defendant. In fact, the letters show that it was the plaintiff who agreed to abide by the Prime Minister's desire and wish that the plaintiff exited Renong and UEM Group. Without any representations to induce the plaintiff made by the first defendant, the essential element of fraud was absent. The cause of action of fraud therefore became untenable and the plaintiff thus had no basis to rely on s 29 of the Limitation Act 1953 (see paras 50 & 52–53).

(5) The limitation period of six years would only be postponed until the plaintiff has discovered the alleged fraud or could have, with reasonable diligence, discovered the alleged fraud. On the facts, in respect of the alleged 2001 Agreement, the plaintiff was fully aware that he would not receive the alleged compensation in 2002. Section 29 therefore clearly would not extend time until 2013 (see paras 55–56).

(6) The alleged 2003 Agreement must be rejected as inherently incredible and/or inconsistent with the contemporaneous documents. The plaintiff had agreed with the third defendant to accept a sum of RM165m as final settlement with respect to compensation for giving up control of UEM and Renong. The plaintiff was bound by the settlement agreement and his claim against the defendant could not be sustained (see paras 59, 61 & 69).

(7) There was no reason why the matter should go for trial. The plaintiff's allegations were inconsistent with the contemporaneous documents and inherently improbable. Hence, the plaintiff's claim was clearly unsustainable. The statement of claim was scandalous, frivolous, vexatious and an abuse of the process of the court (see paras 70–71).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa defendan kedua dan ketiga melalui ejen mereka, defendan pertama, telah mendorong plaintif untuk keluar dari kedua-dua Renong dan Kumpulan UEM sebagai balasan bagi bayaran yang dinyatakan dalam Perjanjian 2001 yang dikatakan itu. Menurut plaintif, melalui surat bertarikh 18 Julai 2001 kepada Tun Dr Mahathir, plaintif telah merekodkan pemahamannya tentang apa yang telah berlaku dalam mesyuarat pada 17 Julai 2001 dengan defendan pertama, termasuklah 'pampasan', antara lain, RM1.3 bilion yang perlu dibayar kepadanya oleh defendan ketiga. Plaintif berhujah bahawa defendan pertama telah diberikan kuasa oleh Tun Dr Mahathir untuk

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membuat keputusan bagi pihak kerajaan dan defendan ketiga. Surat ini dengan itu dinyatakan untuk merekod Perjanjian 2001 yang dikatakan itu. Plaintif berhujah bahawa oleh kerana bukan Tun Dr Mahathir, defendan pertama mahupun sesiapa telah menjawab surat 18 Julai 2001 itu, maka ia dianggap tidak disangkal. Plaintif mengatakan bahawa representasi yang dibuat oleh defendan pertama adalah secara fraud kerana defendan-defendan tidak pernah mempunyai apa-apa niat untuk melaksanakan Perjanjian 2001 itu. Menurut plaintif, sejurus selepas menerima sejumlah RM165 juta daripada defendan ketiga, dia telah berjumpa defendan pertama yang meyakinkannya bahawa defendan kedua dan ketiga akan menguruskan bayaran yang kena dibayar di bawah Perjanjian 2001 itu kemudian. Ini, seperti mana dituntut plaintif, menjadi asas Perjanjian 2003 yang dimaksudkan. Plaintif berhujah bahawa persetujuannya untuk memasuki Perjanjian-Perjanjian 2001 dan 2003 telah disebabkan oleh fraud defendan-defendan dan bahawa dia berhak untuk berkeras menyatakan bahawa Perjanjian-Perjanjian 2001 dan/atau 2003 dilaksanakan dan bahawa dia diletakkan dalam kedudukan sepatutnya di mana jika representasi-representasi itu adalah benar. Defendan-defendan memohon untuk membatalkan tuntutan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 atas alasan bahawa relief yang dipohon adalah adalah bersifat skandal, remeh dan menyusahkan, dikira akan menjejaskan, memalukan dan melambatkan perbicaraan adil tindakan itu, dan satu penyalahgunaan proses mahkamah. Defendan-defendan juga mendakwa bahawa tuntutan plaintif patut dibatalkan kerana telah luput had masa. Defendan ketiga selanjutnya berhujah bahawa dengan meminta dan menerima jumlah RM165 juta itu, plaintif telah melepaskan semua haknya di bawah Perjanjian 2001 yang dikatakan itu dan defendan ketiga dengan itu terlepas daripada semua tanggungjawab di bawahnya. Plaintif berhujah bahawa oleh kerana isu tentang sama ada defendan pertama mempunyai kuasa adalah tertakluk kepada pertikaian fakta yang serius, ia tidak boleh diselesaikan melalui keterangan afidavit dan perlu dibicarakan.

Diputuskan, membenarkan permohonan defendan-defendan dengan kos:

(1) Oleh kerana tiada jawapan atau pengesahan daripada Tun Dr Mahathir, tiada kontrak sah yang mengikat telah wujud berkenaan terma-terma berhubung surat 18 Julai 2001. Keterangan jelas tidak membuktikan bahawa terdapat apa-apa perjanjian yang telah tercapai. Tiada apa-apa pengakuan oleh defendan-defendan berhubung surat 2001 itu (lihat perenggan 29–30).

(2) Tiada pertikaian fakta berhubung hujah plaintif bahawa defendan pertama mempunyai kuasa untuk membuat keputusan bagi pihak kerajaan dan defendan ketiga. Adalah jelas daripada keterangan bahawa surat plaintif kepada Tun Dr Mahathir bertarikh 31 Oktober 2002 menunjukkan bahawa keputusan berhubung isu pampasan terletak pada Tun Dr Mahathir dan bukan defendan pertama. Sehubungan itu,

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defendan pertama diberi kuasa hanya untuk menguruskan perkara itu tetapi keputusan berhubung isu pampasan adalah dengan Tun Dr Mahathir. Selanjutnya surat plaintif sendiri bertarikh 16 Julai 2001 kepada Tun Dr Mahathir menunjukkan bahawa keputusan muktamad berhubung isu pampasan adalah dengan Tun Dr Mahathir (lihat perenggan 34–37).

(3) Jikapun mahkamah tersilap dalam memutuskan bahawa tiada Perjanjian 2001 antara pihak-pihak, keterangan jelas menunjukkan bahawa plaintif terlebih dahulu dapat mengetahui bahawa Perjanjian 2001 tidak dapat dipenuhi oleh defendan-defendan, melalui surat bertarikh 11 November 2002. Justeru, masa bermula dari tarikh tersebut dan perkara itu menjadi luput had masa pada 12 November 2008. Tindakan dalam kes ini telah difailkan pada 17 April 2013 iaitu yang telah luput had masa selama empat tahun dan lima bulan (lihat perenggan 42 & 48).

(4) Pliding plaintif adalah berasaskan representasi palsu yang dibuat oleh defendan pertama untuk mendorongnya keluar daripada Renong dan Kumpulan UEM. Walau bagaimanapun, keterangan menunjukkan bahawa tiada kenyataan pra perjanjian yang dianggap dorongan yang berpunca daripada defendan pertama. Bahkan, surat-surat itu menunjukkan bahawa plaintif yang bersetuju untuk mematuhi hasrat Perdana Menteri itu dan ingin plaintif keluar daripada Renong dan Kumpulan UEM. Tanpa apa-apa representasi untuk mendorong plaintif yang dibuat oleh defendan pertama, elemen penting fraud tiada. Kausa tindakan untuk penipuan dengan itu tidak dapat dipertahankan dan plaintif tiada asas untuk bergantung kepada s 29 Akta Had Masa 1953 (lihat perenggan 50 & 52–53).

(5) Tempoh had masa untuk enam tahun hanya boleh ditangguhkan sehingga plaintif mendapati terdapat atau mungkin terdapat fraud yang dikatakan, dengan usahan yang munasabah, mendapati fraud yang dikatakan itu. Berdasarkan fakta, berkenaan Perjanjian 2001 yang dikatakan itu, plaintif menyedari bahawa tidak akan menerima pampasan yang dikatakan pada 2002. Seksyen 29 dengan itu jelas tidak akan melanjutkan masa sehingga 2013 (lihat perenggan 55–56).

(6) Perjanjian 2003 yang dikatakan itu hendaklah ditolak kerana memang luar biasa dan/atau tidak selaras dengan dokumen semasa. Plaintif telah bersetuju dengan defendan ketiga untuk menerima jumlah RM165 juta sebagai penyelesaian muktamad berhubung pampasan untuk melepaskan kawalan UEM dan Renong. Plaintif terikat dengan perjanjian penyelesaian dan tuntutannya terhadap defendan tidak boleh dikekalkan (lihat perenggan 59, 61 & 69).

(7) Tiada sebab kenapa perkara ini patut dibicarakan. Dakwaan plaintif adalah tidak konsisten dengan dokumen semasa dan memang tidak

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berkemungkinan. Justeru, tuntutan plaintif jelas tidak boleh dikekalkan. Penyataan tuntutan adalah bersifat skandal, remeh, menyusahkan dan satu penyalahgunaan proses mahkamah (lihat perenggan 70–71).]

Notes

For cases on application for striking out, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8368–8383.

For cases on concluded contract, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4643–4662.

Cases referred to

Nagandran a/l Kalianna Gaundar (berniaga di bawah Raju Restoran) v Melinda Alison Monteiro and Others [2006] MLJU 301; [2006] 4 CLJ 573, HC (folld)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (folld)

British Russian Gazette and Trade Outlook, Ltd v Associated Newspapers, Ltd; Talbot v Same [1933] All ER Rep 320, CA (refd)

Misliha Binti Lagiman v Linguaphone Distributors Sdn Bhd [2003] MLJU 703; [2003] 1 LNS 598, HC (folld)

Payana Reena Saminathan v Pana Lana Palaniappa [1914] AC 618, PC (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (folld)

Tan Sri Dato' Eric Chia Eng Hock v NKK Corporation (Japan) [2004] MLJU 293; [2004] 7 CLJ 137, HC (refd)

Legislation referred to

Contracts Act 1950 s 19(2)
Limitation Act 1953 s 29
Rules of Court 2012 O18 r 19(1)(b), (c), (d)

(Sreenevasan Young) for the plaintiff.
(Lee Hishammuddin Allen & Gledhill) for the third defendant.

Hanipah Farikullah J:

INTRODUCTION

[1] The plaintiff in this action claims, inter alia, that the second and third defendants through their agent, the first defendant, had induced the plaintiff to exit both the Renong and UEM Group ('the groups') in consideration of the payments stated in the 2001 Agreement. It is alleged that representations made by the first defendant were fraudulent as the defendants never had any intention of performing the 2001 Agreement.

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[2] Further and/or in the alternative the plaintiff claims that his consent to enter into the 2001 and 2003 Agreements was caused by the fraud of the defendants. The second defendant and/or the third defendant entered into the said agreements with intent to deceive and/or induce the plaintiff into entering both agreements. The plaintiff claims that he is entitled to insist that the 2001 and/or 2003 Agreements be performed and that he be put in a position that he would have been if the representations had been true.

[3] Vide encl (9), the first and second defendants applied to strike out the plaintiff's claim under O 18 r 19(1)(b) or (d) of the Rules of Court 2012.

[4] The third defendant's application to strike out the plaintiff's claim vide encl (12) is made under O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012.

[5] In this present case, the defendants are seeking to strike out the plaintiff's claim on the grounds that the relief sought is scandalous, frivolous and vexatious, calculated to prejudice, embarrass and delay the fair trial of the action, and an abuse of the process of the court.

[6] The defendants also alleged that the plaintiff's claim should be strike out on the basis that the plaintiff's claim is time barred.

[7] Against the defendants position, the plaintiff contended there are serious factual disputes in this matter that cannot be resolved by affidavit evidence. In relation to this, the plaintiff submitted that all relevant witnesses including Tun Dr Mahathir will have to give evidence.

BACKGROUND FACTS

[8] Before addressing the defendants' application, it is necessary to refer to some of the facts that provide the basis to the plaintiff's claims.

[9] Basically, the plaintiff pleaded as follows:

(a) in January 1998, the plaintiff offered to purchase Renong shares from United Engineers (M) Bhd ('UEM') in his *personal capacity* by way of a put option which was to be paid in four instalments. The first instalment of RM100m was paid on the due date as agreed;

(b) in the first half of 2001, the plaintiff said he had planned making UEM private by acquiring the remainder of the UEM shares he did not own by way of a general offer *through Renong* as an alternative to completing the put option;

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(c) in July 2001, he was summoned to the office of the then Prime Minister who told him to exit the Renong and UEM Groups. In this regard, he was asked to meet the first defendant who was his then special economic advisor;

(d) pursuant to the meeting with the first defendant, the plaintiff wrote a letter dated 16 July 2001 (affidavit 1 by Tan Sri Halim at p 5 para 8) to the Prime Minister requesting the Prime Minister to reconsider his decision and that in the event the Prime Minister did not reverse his decision, proposed certain financial terms as consideration for him exiting both the groups;

(e) on 17 July 2001, the plaintiff met with the first defendant where he was informed that Khazanah would undertake the general offer. It was alleged that in this meeting, an oral agreement ('the 2001 Agreement') regarding the terms of compensation for the plaintiff exiting both the groups was reached; and

(f) in a letter dated 18 July 2001 to the Prime Minister, the plaintiff set out the alleged consideration for the plaintiff supporting the Khazanah general offer by exiting from Renong and UEM Group.

[10] In this regard, Khazanah was to:

(a) pay the plaintiff in cash or kind RM1.3 billion ('the RM1.3 billion obligation');

(b) purchase from the plaintiff 372,000,000 shares in Renong for RM465m at RM1.25 per share ('the Renong purchase obligation');

(c) procure the transfer to the plaintiff the entire equity in Kualiti Alam Sdn Bhd in settlement for the loss of RM508m incurred by the plaintiff for the rescue of Fleet Group and Fleet Holdings ('the Kualiti Alam obligation');

(d) cause the release of the plaintiff from any or all liabilities in respect of the put option ('the put option obligation'); and

(e) procure the sale of Pharmaniaga Bhd to a senior executive of Renong nominated by the plaintiff ('the Pharmaniaga obligation').

[11] The plaintiff then alleged that a separate and distinct oral agreement ('repayment agreement') was made between the plaintiff and the first defendant wherein it was agreed that Khazanah would pay the plaintiff RM100m which the plaintiff had paid UEM to settle the first instalment of the put option.

[12] The plaintiff alleged that he fulfilled his obligations under the 2001

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Agreement by supporting the *Khazanah general offer which was completed on or about 8 October 2001*. He had thereafter made requests to the Prime Minister and the first defendant that what was promised him under the 2001 Agreement be fulfilled.

[13] In May 2003, the plaintiff stated that third defendant honoured the repayment agreement by making the payment of RM100m and an additional RM65m to compensate the plaintiff for losses due to the foreclosure of various assets pledged by the plaintiff to finance the first instalment of the put option.

[14] The plaintiff then alleged that sometime in 2003, the first defendant orally ensured ('the 2003 Agreement') the plaintiff that the defendants would fulfil their obligations under the 2001 Agreement. It was alleged that in consideration of this agreement, the plaintiff did not take steps to enforce the 2001 Agreement.

[15] The plaintiff alleged that despite the 2003 Agreement, the defendants failed to fulfil the 2001 Agreement.

[16] On 23 April 2010, the plaintiff alleged that the ex Prime Minister told him that the first defendant had told the ex Prime Minister that since the assets that the third defendant took over belonged to UMNO, there was no reason to pay the plaintiff anything. The plaintiff alleged that the first defendant confirmed the same reasons for the non-payment.

[17] The plaintiff filed a claim against the defendants for the following reliefs:

(a) RM1.3 billion pursuant to the RM1.3 billion obligation;

(b) general damages for the breach of the Renong purchase obligation;

(c) RM508m being the value of prescribed to the issued and paid up capital of Kualiti Alam Sdn Bhd to be paid in settlement of the plaintiff's losses for the rescue of the Fleet Group and Fleet Holdings Bhd pursuant to the Kualiti Alam obligation;

(d) alternatively, damages for fraudulent misrepresentation;

(e) interest;

(f) cost; and

(g) any further and other relief that this court deems fit and proper to grant.

[18] It is the plaintiff's position that he is entitled to insist that the agreements breached be performed pursuant to s 19(2) of the Contracts Act

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1950 or alternatively, damages for fraudulent misrepresentation.

THE 2001 AGREEMENTS

[19] The first issue to be considered is whether an agreement was reached in July 2001 between the plaintiff and the second defendant and related to this issue is whether the second defendant had the authority to bind the Government of Malaysia ('the GOM')/Khazanah.

[20] It has been stressed in submissions before me by learned counsel for the plaintiff that the 2001 Agreement was reached in July 2001 between the plaintiff and the second defendant.

[21] The background of the 2001 Agreement was explained by the plaintiff as follows:

(a) sometime in early July 2001, Tun Dr Mahathir summoned the plaintiff to a meeting held at his office in Putrajaya;

(b) during this meeting, Tun Dr Mahathir informed the plaintiff that the plaintiff should allow the GOM to take over his shareholdings in the Renong/UEM Group because the Renong/UEM Group had become a systemic risk to the banking system in Malaysia. Tun Dr Mahathir directed the plaintiff to meet with the first defendant, who was Tun Dr Mahathir's then special economic adviser;

(c) on or about 12 July 2001, the plaintiff met with the first defendant at his office in Putrajaya. He brought his lawyer, Tan Sri Rashid, along. In relation to the meeting, the plaintiff averred that:

> During this meeting, Tan Sri Nor made it clear to Tan Sri Rashid and me that he had full authority from Tun Dr Mahathir to deal with me on the issue. Tan Sri Nor informed me forcefully that in no uncertain terms was I to proceed with the put option or with my proposed general offer for UEM, and indicated that the GOM would purchase my shares in Renong and UEM, and subsequently make a general offer for UEM. At that stage, Tan Sri Nor informed us that the GOM's nominee to carry out his proposal would be Permodalan Nasional Bhd or PNB,

(d) further, the plaintiff said that:

(a) During the meeting, the subject matter of consideration for the intended purchase by the GOM came up for discussion. Tan Sri Nor offered to give me shares in Prolink as consideration for the purchase;

(b) Tan Sri Nor made it clear to the both of us that he had full authority from Tun Dr Mahathir to deal with Tan Sri Halim on this issue;

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(c) Tan Sri Nor also mentioned that shares in a company known as Prolink Development Sdn Bhd ('Prolink'), then a subsidiary of Renong, would be given to Tan Sri Halim as consideration for him not making a general offer and for leaving the UEM/Renong group. At the time, Prolink was undertaking the development of a new township known as Bandar Nusajaya in Johor;

(d) as far as both Tan Sri Halim and myself were concerned, Tan Sri Nor spoke on behalf of Tun Dr Mahathir, the Government of Malaysia, and of course, Khazanah. Tan Sri Nor again made clear in no uncertain terms that he had full authority from Tun Dr Mahathir to deal with Tan Sri Halim on this matter; and

(e) in this respect, I refer to Tan Sri Nor's affidavit affirmed on 8.7.2013 filled in these proceedings. Tan Sri Nor at paragraph 8(O) of his affidavit makes reference to what appears to be an initial meeting with Tan Sri Halim after Tun Dr Mahathir had informed Tan Sri Halim of the Government of Malaysia's plans to take over the UEM/Renong group.

[22] The plaintiff further contended that the 2001 Agreement was reached orally between himself and the first defendant at a further meeting held between them on 17 July 2001, with Tan Sri Rashid also in attendance. In relation to this, the plaintiff averred in his affidavit that:

24. The agreement reached between Tan Sri Nor, on behalf of the Government of Malaysia and/or Khazanah, and myself during the aforesaid meeting ('the 2001 Agreement') was that in consideration of me agreeing not to continue with the put option and agreeing not to proceed with the proposed general offer and instead supporting the general offer by Khazanah for the shares in UEM (or any person designated by Khazanah as the acquirer)('the Khazanah GO'), Khazanah or its designated acquirer as the case may be would:

> 24.1 pay or procure the payment to me in cash or kind RM1.3 billion of which the sum of RM325 million will be paid in cash, RM325 million in cash equivalent and the balance of RM650 million in land within the Prolink development ('the RM1.3 billion Obligation');
>
> 24.2 purchase from me 372,000,000 shares in Renong, (representing 16% of Renong's equity) for RM465 million at RM1.25 per share ('the Renong Purchase Obligation');
>
> 24.3 procure the transfer to me of the entire equity in Kualiti Alam Sdn Bhd free of all encumbrances in settlement of the loss of RM508 million incurred by me for the rescue of Fleet Group and Fleet Holdings ('the Kualiti Alam Obligation');

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> 24.4 caused my release from any and all liability in respect of the put option ('the put option Obligation'); and
>
> 24.5 procure the sale of Pharmaniaga Berhad to a senior executive of Renong nominated by me ('the Pharmaniaga Obligation').

[23] According to the plaintiff, the terms above were reduced into writing by a letter dated 18 July 2001 sent by the plaintiff to Tun Dr Mahathir ('the 18 July letter').

[24] By letter dated 18 July 2001 to Tun Dr Mahathir (and not copied to any of the defendants), drafted by his lawyer, Tan Sri Rashid Manaf, the plaintiff recorded his understanding of what had transpired at a meeting on 17 July 2001 with the first defendant, including 'compensation' of, inter alia, RM1.3 billion to be paid to him by the third defendant ('alleged compensation'). It was suggested by learned counsel for the plaintiff that this letter is said to record the alleged 2001 Agreement.

[25] The foundation of the plaintiff's case is that since neither Tun Dr Mahathir, the first defendant nor anyone else have responded to the 18 July letter therefore it stands unrebutted.

[26] With respect, in my view there is no merit in the plaintiff's contention. The affidavit evidence shows that in early July 2001, Tun Dr Mahathir, the then Prime Minister, informed the plaintiff that the GOM had decided to take over UEM and asked him to see Tan Sri Nor Mohamed Yakcop ('the first defendant') about this. Eventually, the third defendant did take over UEM ('UEM GO').

[27] By a letter dated 16 July 2001 to Tun Dr Mahathir (and not copied to any of the defendants), drafted by his lawyer, Tan Sri Rashid Manaf, the plaintiff recorded his understanding of what had transpired at his meeting on 12 July 2001 with the first defendant.

[28] It must be emphasised that the plaintiff's own letter dated 18 July 2001 seeks Tun Dr Mahathir's confirmation that the letter is accurate. It is not a disputed fact that Tun Dr Mahathir did not respond to 18 July letter.

[29] Thus, in my view, since there was no response or confirmation from Tun Dr Mahathir, the then Prime Minister, no legal binding contract has been created in respect of the terms of the 18 July letter.

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[30] The evidence clearly does not establish that any agreement has been reached. There was never any admission by the defendants of the 18 July letter.

WHETHER THE FIRST DEFENDANT HAS AUTHORITY

[31] The next question is whether the first defendant has authority.

[32] The plaintiff contended that the first defendant had been given an authority by Tun Dr Mahathir to make decision on behalf of the GOM and the third defendant. In support of his contention, learned counsel relied on a letter from Tun Dr Mahathir dated 31 October 2002 which states that:

> Saya telah semak perkara ini bersama Tan Sri Mohamed Yakcop dan berpuas hati bahawa cadangan yang dikemukakan oleh beliau kepada Tan Sri yang telah diluluskan oleh saya adalah berpatutan dan saya berpendapat adalah sebagai penyelesaian muktamad.
>
> Saya ingin mengesyorkan agar Tan Sri menerima tawaran yang dicadangkan supaya perkara ini tidak berlarutan.

[33] Learned counsel for the plaintiff argued that whether the first defendant had authority is subject to serious factual disputes that cannot be resolved by affidavit evidence. It was contended by the plaintiff that the matter has to go for trial for witnesses to give evidence including Tun Dr Mahathir.

[34] With respect, it seems to me that there is no factual dispute in respect of the plaintiff's contention that the first defendant had authority to decide on behalf of the GOM and the third defendant.

[35] It is plain from the evidence that the plaintiff's letter to Tun Dr Mahathir dated 31 October 2002 shows that the decision on the issue of compensation is rested with Tun Dr Mahathir and not with the first defendant. In this respect, the first defendant was authorised only to deal with the matter but *the decision on the issue of compensation is with Tun Dr Mahathir.*

[36] Tun Dr Mahathir said in his 31 October 2002 letter to the plaintiff:

> Rujukan : Surat Tan Sri bertarikh 7 Oktober2002
>
> Saya telah semak perkara ini bersama Tan Sri Nor Mohamed Yakcop dan berpuas hati bahawa cadangan yang dikemukakan oleh beliau kepada Tan Sri yang telah diluluskan oleh saya adalah berpatutan dan saya berpendapat adalah sebagai penyelesaian muktamad. Saya ingin mengesyorkan agar Tan Sri menerima tawaran yang dicadangkan supaya perkara ini tidak berlarutan.

[37] Further, the plaintiff's own letter dated 16 July 2001 to Tun Dr Mahathir shows that the final decision on the issue of compensation is with

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Tun Dr Mahathir. The plaintiff said in his letter:

> I would accordingly request YAB Dato' Seri reconsideration of the decision not to allow Renong to carry out a GO on UEM. *However if it is YAB's Dato' Seri's desire that I exit from the Group, I shall see it as my duty to abide by your desire* ... I would beg to stay with the Group *but if Dato' Seri still desire for me to go, may I seek YAB Dato' Seri's permission and indulgence and suggest the following settlement instead* ....

[38] In fact, vide letter dated 29 March 2002, the plaintiff acknowledged to Tun Dr Mahathir that:

> ... I have not heard anything I assured *the request have not met YAB's approval* ...
>
> *I appeal to YAB and hope my request for a fast settlement be given YAB's kind attention*. (Emphasis added.)

[39] By his letter dated 13 May 2003 to the third defendant, the plaintiff recorded his various meetings with the third defendant and agreed to accept RM165m as 'final settlement of his claims with respect to compensation to cover loss of capital in giving up control of the Renong and UEM group of companies following the successful completion of the UEM GO'. It is common ground that this RM165m was paid to his solicitors Messrs Shearn Delamore & Co.

[40] In relation to this, I accept the submission of learned counsel for the third defendant that thereafter, there is a deafening silence in the documentary trail. Not a single letter was sent by the plaintiff to anyone about this alleged 2001 Agreement, until the filing of this action on 17 April 2013, ten years later. There was not even a letter of demand.

[41] On these facts, it is clear that by 2002, at latest, the plaintiff was well aware that none of the defendants were going to pay him the alleged compensation. It is also clear that at the material time after 2003, everybody understood the RM165m was in full and final settlement. It is for this reason that there is not a single letter from the plaintiff after the payment of RM165m.

THE LIMITATION ACT

[42] If I am wrong in concluding that there was no 2001 Agreement between the parties, it is my view that the evidence clearly shows that the plaintiff first came to know that the terms of the 2001 Agreement were not going to be met by the defendants, vide a letter dated 11 November 2002 when the plaintiff was informed of the Prime Minister's decision in a letter dated 31 October 2002.

[43] On 31 October 2002, Tun Dr Mahathir replied to the plaintiff's letter of 7 October 2002. Tun Dr Mahathir informed the plaintiff that he considered

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A the first defendant's proposal as reasonable, and had approved it as full settlement. The plaintiff said that the proposal approved by Tun Dr Mahathir was for a much lesser sum than the alleged 2001 Agreement.

B **[44]** By his letter of 13 November 2002 to Tun Dr Mahathir (and not copied to any of the defendants), the plaintiff recorded his meeting on 11 November 2002 with the first defendant. This letter shows clearly his awareness that he would not be paid the alleged compensation. The plaintiff concludes the letter by leaving it to Tun Dr Mahatir to decide on a reasonable amount and requesting that he be paid at least enough to settle all his debts.

C

[45] By his letter of 7 February 2003 to Tun Dr Mahathir (and not copied to any of the defendants), the plaintiff recorded his recent meeting with Tun Dr Mahatir, and his understanding of the matters discussed there. This letter shows clearly his awareness that he would not be paid the alleged

D compensation. The plaintiff concludes the letter by proposing various options and recording that he wanted monies to settle his debts.

[46] As I have stated earlier, by his letter of 13 May 2003 to the third

E defendant, the plaintiff recorded his various meetings with the third defendant and agreed to accept RM165m as 'final settlement of his claims with respect to compensation to cover loss of capital in giving up control of the Renong and UEM group of companies following the successful completion of the UEM GO'. It is not disputed that this RM165m was paid to his solicitors Messrs

F Shearn Delamore & Co.

[47] The above documents clearly shows that the plaintiff knew that as at 11 November 2002, the terms of the 2001 Agreement was not going to be made by the then Prime Minister.

G

[48] Hence, I agreed with the submission of the learned federal counsel that the plaintiff knew that as at 11 November 2002 the terms of the 2001 Agreement was not going to be met from the person who ultimately decides on the amount of compensation *this time started running from this date and the*

H *matter became statute barred as at 12 November 2008*. The action in this case was filed on 17 April 2013 which is *four years and five months out of time.*

[49] Thus, the matter would still be statute barred even if it is accepted as a true fact that the first defendant had orally agreed that the terms of the 2001

I Agreement would be fulfilled. The plaintiff had six years to bring the action and time ran out in 2009.

[50] As I have said earlier, the plaintiff's pleading is premised on the false representation made by the first defendant to induce him to exit from Renong

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and UEM Group by not proceeding with the put option and the general offer for UEM as well as agreeing to support the Khazanah general offer.

[51] I am of the view that the plaintiff's admissions in his own unsolicited letters to the Prime Minister plainly and obviously show that the plaintiff exited Renong and UEM Group and supported the Khazanah general offer on the directions of the Prime Minister and not through the inducements of the first defendant. The plaintiff's admissions are stated in the following letters:

(a) in the letter dated 16 July 2001 (affidavit 1 by Tan Sri Halim at p 5 para 8) the plaintiff stated that, 'I would accordingly request YAB Dato' Seri reconsideration of the decision not to allow Renong to carry out a GO on UEM. *However if it is YAB's Dato' Seri's desire that I exit from the Group, I shall see it as my duty to abide by your desire* ... I would beg to stay with the Group *but if Dato' Seri still desire for me to go, may I seek YAB Dato' Seri's permission and indulgence and suggest the following settlement instead* ...';

(b) in the letter dated 13 August 2002 (affidavit 1 by Tan Sri Halim at p 40) the plaintiff stated that, 'YAB had instructed me not to proceed with my GO for Renong and UEM'; and

(c) in the letter dated 7 October 2002 (affidavit 1 by Tan Sri Halim at p 41) the plaintiff stated that, 'If YAB Dato' Seri would recall, I met YAB Dato' Seri prior to the UEM GO and YAB Dato' Seri advised me to see Tan Sri Nor Mohamed and Tun Daim Zainuddin. *Tun Daim Zainuddin advised me not to stand in the way of YAB PM's plan and to trust the PM* ... Tun Daim wrote to YAB Dato' Seri regarding the same. *If I had not agreed to the GO there would be nothing that the government could do, but I gave to Dato' Seri's wishes because I trusted in your wisdom and that of Tun Daim's. I have a lot of respect for YAB Dato' Seri. Loyalty was and still paramount to me*.

[52] These statements clearly show that there was no pre-agreement statements amounting to an inducement that emanated from the first defendant. In fact, the letters show that it was the plaintiff who agreed to abide by the Prime Minister's desire and wish that the plaintiff exits Renong and EM Group and support the Khazanah's general offer.

[53] Without any representations to induce the plaintiff made by the first defendant, the essential element of fraud is absent. In my view, the cause of action of fraud therefore becomes untenable and the result is that the plaintiff has no basis to rely on s 29 of the Limitation Act 1953.

[54] In the circumstances, there is no merit in the plaintiff's reliance on s 29 of the Limitation Act 1953. Section 29 of the Limitation Act 1953 states:

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A Where, in the case of any action for which a period of limitation is prescribed by this Act, either —

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

B (b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it* ...

C

[55] It is clear from a plain reading of the section that the limitation period of six years would only be postponed until the plaintiff has discovered the alleged fraud or could have, with reasonable diligence, discovered the alleged
D fraud.

[56] On the facts, in respect of the alleged 2001 Agreement, the plaintiff was fully aware that he would not receive the alleged compensation in 2002. Section 29 therefore clearly does not extend time until 2013.

E

THE 2003 AGREEMENT

[57] According to the plaintiff, soon after receiving the RM165m from the third defendant, he met the first defendant who assured him that the second
F and third defendants would deal with payments due under the 2001 Agreement later. This forms the basis of the 2003 Agreement.

[58] In this connection, the plaintiff claims that in 2010, he met Tun Dr
G Mahathir and the first defendant separately and was informed that he would not be paid the alleged 2001 Agreement.

[59] Against these allegation, learned counsel for the third defendant submitted, which I accepted, that this alleged 2003 Agreement must be
H rejected as inherently incredible and/or inconsistent with the contemporaneous documents for the following reasons:

(a) the plaintiff's own letters make it very plain that in 2002, he already knew that he is not going to be paid the alleged compensation. This was
I the subject of discussion between the parties including the letter from the Prime Minister himself. It is inherently incredible that having the support of Tun Dr Mahathir consistently taken a stand throughout 2002 and early 2003 that the alleged compensation would not be paid, the first defendant would completely change his position in May 2003 after payment of the RM165m in full settlement;

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(b) it is inherently incredible that the plaintiff, who was so punctilious about recording every single meeting that he held with Tun Dr Mahathir and the first defendant, and even recording his inability to arrange meetings with the first defendant, and who had two eminent lawyers (Tan Sri Rashid Manaf and Messrs Shearn Delamore & Co), would not have written a letter to record this alleged 2003 Agreement, if it had occurred;

(c) it should be noted that even after the alleged meetings of 2010 with Tun Dr Mahathir and the first defendant, at which he said to be accompanied by Tan Sri Rashid Manaf, the plaintiff did not write a letter recording the alleged 2003 Agreement or 2010 meetings; and

(d) further, if these 2010 meetings had occurred, the plaintiff would not have waited a further three years to issue the writ.

[60] It must be emphasised that the plaintiff on 13 May 2003 wrote to the third defendant as follows:

> ... *As agreed. I hereby seek a payment of RM165,000,000.00 as final settlement on the claim with respect to compensation to cover loss of capital in giving up control of the Renong and UEM Group of Companies* pursuant to the successful completion of the takeover exercise by Syarikat Danasaham which is in turn owned by Khazanah ...

[61] A plain reading of the letter shows that the plaintiff has agreed with the third defendant to accept a sum of RM165m as final settlement with respect to compensation for giving up control of UEM and Renong following the successful takeover of UEM by the third defendant.

[62] In *Tan Sri Dato' Eric Chia Eng Hock v NKK Corporation (Japan)* [2004] MLJU 293; [2004] 7 CLJ 137, the court held that where the plaintiff has not been able to bring his claim within s 29 of the Limitation Act 1953, the court will not hesitate to strike it out as being frivolous and vexatious:

> ... In my judgment, by reason of s 6(1)(a), the present suit, filed on 2 October 2002, is out of time by a year and is thus frivolous, vexatious and an abuse of the process of the court. In *Ronex Properties Ltd v John Laing Construction Ltd and Other* [1982] 3 All ER 961, the English Court of Appeal held (at p 968):
>
> > *Where it is thought to be clear that there is a defence under the Limitation Act*, the defendant can either plead that defence and seek the trial of a preliminary issue, or in a very clear case, *he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence.* (Emphasis added.)

[63] For all those reasons, I am satisfied that the plaintiff's claim is time barred and should be struck out.

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A ACCORD AND SATISFACTION

[64] Finally, I will consider the defence of accord and satisfaction submitted for the third defendant.

B

[65] Learned counsel for the third defendant argued that by requesting and accepting the sum of RM165m, the plaintiff has abandoned all his rights under the alleged 2001 Agreement and the third defendant is thereby released from all purported obligations thereunder. Learned counsel for the third defendant
C referred to a number of authorities on this point, (see *British Russian Gazette and Trade Outlook, Ltd v Associated Newspapers, Ltd; Talbot v Same* [1933] All ER Rep 320 (COA, UK) /*Payana Reena Saminathan v Pana Lana Palaniappa* [1914] AC 618).

D **[66]** However, the plaintiff has attempted to justify the wording of the letter dated 13 May 2003 by claiming it was issued for tax reasons and was not meant to be a settlement of his entire claim.

[67] Learned counsel for the third defendant rightly pointed out that in the
E plethora of documents produced by the plaintiff, this so-called tax advice has not been produced, nor any affidavit by his alleged tax advisors. He has not even named the tax advisor.

[68] Further, it was submitted for the plaintiff that the RM165m was merely
F to repay and compensate him for the amount he paid to UEM pursuant to the put option. With respect, I agree with the submission of learned counsel for the third defendant that this explanation is inconsistent with the contemporaneous documents based on the following grounds:

G (a) apart from being an experienced businessman himself, the plaintiff was being advised by Tan Sri Rashid Manaf and Messrs Shearn Delamore & Co. There is no doubt that with such prominent and experienced lawyers advising him, the plaintiff would have expressly reserved his rights in his letter dated 13 May 2003, if there was indeed such a
H substantial residual claim pending against the third defendant; and

(b) the plaintiff's own conduct plainly does not support this allegation. It will be noted that prior to the payment being made, the plaintiff had written no less than ten times to Tun Dr Mahathir requesting for compensation to be paid as soon as possible. However, after receipt of
I payment, he did not send a single letter to the second or the third defendant although he claims that there was a sum of more than a billion Ringgit still owing to him. In fact, the first time he has mentioned this residual claim was when this action was filed more than ten years after he received the payment of RM165m from the third defendant.

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[69] It is plain on the evidence that the plaintiff is bound by the settlement agreement and his claim against the defendant cannot be sustained *(Nagandran a/l Kalianna Gaundar (berniaga di bawah Raju Restoran) v Melinda Alison Monteiro and Others* [2006] MLJU 301; [2006] 4 CLJ 573; *Misliha Binti Lagiman v Linguaphone Distributors Sdn Bhd* [2003] MLJU 703; [2003] 1 LNS 598 followed).

[70] In the circumstances of this case, there is no reason why the matter should go for trial. It seems to me that the plaintiff's allegations are inconsistent with the contemporaneous documents and inherently improbable (*Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309 and *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 followed.)

CONCLUSION

[71] In the light of the above reasons, the plaintiff's claim is clearly unsustainable. Hence, I allow the defendant's applications to strike out the statement of claim for it is scandalous, frivolous, vexatious and an abuse of the process of the court.

[72] I further award costs of RM25,000 to each of the defendants.

Defendants' applications allowed with costs.

Reported by Kanesh Sundrum